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No. 78-1082

In the Supreme Court of the United States

OCTOBER TERM, 1978

GEORGE CONZEMIUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that he was denied a fair trial because the court informed the jury that two of his alleged co-conspirators had been convicted of the offenses for which petitioner was being tried.

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of seven counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371. He was sentenced to 18 months' imprisonment (Pet. App. A-1 & n.1).

The government's evidence showed that petitioner conspired with Ronald Gilbertson and Leonard McCracken to defraud the Hastings Cooperative Elevator Association of profits from the sale of fertilizer. Gilbertson and McCracken were key employees of Hastings Cooperative, and petitioner was a member of the

cooperative. Petitioner, Gilbertson, and McCracken were also the officers and owners of two other corporations; these two corporations bought fertilizer from third parties and resold it to Hastings Cooperative at a higher price than the cooperative would have paid had it purchased the fertilizer directly from the third parties (Pet. App. A-2). Petitioner, Gilbertson, and McCracken also arranged for the two corporations to act as middlemen in Hastings Cooperative's sales to third parties, and the two corporations received the bulk of the profits on these transactions (*ibid.*).

The court of appeals properly concluded (Pet. App. A-7 n.6) that the district court did not err in informing the jury during voir dire, without objection, that petitioner's co-conspirators, Gilbertson and McCracken, had been convicted of the offenses for which petitioner was being tried. During a pretrial conference, the district court discussed with petitioner's counsel the expectation that since McCracken and Gilbertson had been referred to in the indictment, their names were likely to be mentioned during the course of the trial (H. Tr. 13).[1] The court expressed concern that petitioner might be prejudiced because McCracken's and Gilbertson's cases had received "some publicity," and jurors might therefore be aware of their convictions (H. Tr. 13-14). The court also commented that if McCracken and Gilbertson testified, as expected, their convictions could be properly brought out (H. Tr. 16-17).[2] Petitioner's attorney agreed that some of

[1]"H. Tr." refers to the transcript of the pretrial hearing held on September 22, 1977.

[2]As petitioner acknowledges (Pet. 6), although McCracken and Gilbertson ultimately did not testify, and no evidence of their convictions was received, "before trial counsel for both sides and the judge expected McCracken and Gilbertson to testify for the prosecution and that therefore their conviction would be properly in evidence." Petitioner also concedes (*ibid.*) that "nothing in the record suggests bad faith or deceit on anyone's part."

the prospective jurors might have learned of the co-defendants' convictions from the publicity (H. Tr. 14, 16). He also agreed with the court's proposal to question prospective jurors individually about their knowledge of McCracken's and Gilbertson's cases, and to instruct them that they must determine petitioner's guilt or innocence solely on the basis of the evidence at trial without regard to the outcome of the co-defendant's cases (*id.* at 14-15).

Accordingly, during voir dire the court stated that there might be evidence at trial that other defendants had been tried and found guilty "as to various counts of the indictment," but that each defendant's guilt or innocence must be decided separately, and that the jury must not draw any inference that petitioner must be guilty if his co-defendants were (I Tr. 34-35). The court then asked whether any of the prospective jurors believed he would be unable to set aside his knowledge of any such facts and decide the case solely on the evidence introduced at trial, and no juror responded (I Tr. 35). The court also individually questioned each prospective juror who stated that he had read or heard about the charges against petitioner and his co-defendants in an effort to determine whether their verdict might be influenced (I Tr. 37-39, 54-84). In its closing instructions the court reminded the jury of its admonition that the co-defendants' convictions could not affect their verdict in petitioner's case, and that petitioner was "entitled to a fair and separate determination" of his guilt or innocence (Tr. Jury Instructions 5).[3]

In these circumstances, there is no merit to petitioner's contention that he is entitled to a new trial because the jury was informed of his co-defendants' convictions. Although a co-defendant's conviction may not be introduced as evidence of the defendant's guilt, a defendant is not deemed to have been prejudiced when the

[3]"Tr. Jury Instructions" refers to the separately bound and paginated transcript of the court's instructions to the jury.

fact of such a conviction is revealed for some other purpose, provided the jury is given a cautionary instruction. See, *e.g., United States* v. *Wiesle,* 542 F. 2d 61, 62-63 (8th Cir. 1976); *United States* v. *Bryza,* 522 F. 2d 414, 424-425 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976); *United States* v. *Davis,* 487 F. 2d 112, 120 (5th Cir. 1973), cert. denied, 415 U.S. 981 (1974); *United States* v. *Rothman,* 463 F. 2d 488, 490 (2d Cir. 1972); *Koolish* v. *United States,* 340 F. 2d 513, 529-531 (8th Cir. 1965); *United States* v. *Aronson,* 319 F. 2d 48, 51-52 (2d Cir. 1963).[4]

Here, the fact of the co-defendants' convictions was not introduced as evidence of petitioner's guilt. The trial court informed the jury panel of the co-defendants' convictions in an effort to ensure that pretrial publicity about their cases did not prejudice petitioner, and to anticipate and prevent the jury's drawing any inference of petitioner's guilt if, as anticipated, evidence of the co-defendant's convictions were introduced. The court gave several careful cautionary instructions.

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[4]The cases petitioner relies upon (Pet. 6-7), in contrast, involved either a district court's failure to give a cautionary instruction (*e.g., United States* v. *Harrell,* 436 F. 2d 606, 614 (5th Cir. 1970)), or an erroneous instruction that permitted the jury to consider a co-defendant's conviction as evidence of the defendant's guilt (*e.g., Trussell* v. *United States,* 278 F. 2d 478, 480 (6th Cir. 1960)). And in *United States* v. *Womack,* 454 F. 2d 1337, 1346 (5th Cir. 1972), the court of appeals concluded that the trial judge had not been justified in overruling the defendant's objection and informing the jury that Womack's co-defendants had each been found guilty by a jury. In contrast to the present case, it was not anticipated that evidence of these convictions would be introduced at trial or might already be known by the jury, and the court informed the jury of the convictions simply to explain why they were named in the indictment but not on trial with Womack. The court found the mention of the prior convictions especially serious because "the guilt of each defendant is closely tied to that of the others." 454 F. 2d at 1346. Here, however, petitioner's defense did not depend on a showing that McCracken and Gilbertson were innocent.

We believe it would have been preferable for the trial judge to wait until a reference to the co-defendants' convictions was made at trial before giving a cautionary instruction. Nevertheless, as the court of appeals emphasized (Pet. App. A-7 n.6), petitioner's counsel was informed of the trial court's proposed plan of action, and he interposed no objection. The failure of petitioner's counsel to object to this procedure may well have been the result of his recognition that in the circumstances of this case the jury's knowledge of the co-defendants' convictions would not be prejudicial, since petitioner's defense was not based on an assertion of McCracken's and Gilbertson's innocence, but rather on the theory that petitioner had been unaware of McCracken and Gilbertson's fraudulent scheme. Since petitioner acquiesced in the procedure followed by the trial court and suffered no prejudice, he is not entitled to a new trial, and further review by this Court is not warranted.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979

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[5]There is no reason to defer decision of this case until the Court decides *Parker* v. *Randolph,* No. 78-99, certiorari granted November 27, 1978, which presents the question whether the admission at a joint trial of out-of-court confessions by three co-defendants who did not testify violated the rights of the defendants other than the declarants to confront the witnesses against them. That question is not presented in the instant case.

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